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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSÉ GARCIA AND STEVEN MENÉNDEZ, Defendants and Appellants.	B221672 (Los Angeles County Super. Ct. No. BA318570)

APPEAL from judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge. Affirmed.

Gail Harper, under appointment by the Court of Appeal, for Defendant and Appellant José Garcia.

Rodger P. Curnow, under appointment by the Court of Appeal, for Defendant and Appellant Steven Menéndez

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants challenge their convictions and sentences arising from their street-gang-related involvement in the drive-by shooting of Danny Saavedra, a 16-year-old nongang member, during his participation in a neighborhood basketball game. We affirm.

BACKGROUND

An amended information charged appellants José Garcia, then 16 years old, and Steven Menéndez, then 14 years old, with the murder of Danny Saavedra. (Pen. Code, § 187, subd. (a).)[1] It alleged that Garcia and Menéndez killed Saavedra while they were active participants in a criminal street gang and that the murder was carried out for the benefit of the gang (§ 190.2, subd. (a)(22); Welf. & Inst. Code, § 707, subd. (d)), that it was perpetrated by discharging a firearm from a motor vehicle with the intent to kill (§ 190.2, subd. (a)(21)); that a principal personally and intentionally discharged a handgun that caused Saavedra's death (§ 12022.53, subds. (b)–(e)); that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)); and that Menéndez personally and intentionally discharged a firearm (§12022.53, subds. (b)–(d). The appellants each pleaded not guilty and denied the special allegations. They were tried as adults.

We set forth the facts in accordance with the jury's verdicts, ignoring inconsistencies that are not relevant to the issues raised in these appeals.

The Shooting

In the evening on March 8, 2007, a few neighborhood teens were playing basketball in a residential area on West 82nd Street in Los Angeles, while several older men watched nearby. A purple Honda Civic occupied by two bald-headed, light-skinned Hispanic men drove by. One of the basketball players told the others that the men in the car had "mad-dogged" them—had given them dirty looks.

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[1] All statutory references are to the Penal Code unless otherwise identified.

About ten minutes later the Honda returned, driving more slowly. Witnesses heard someone yell "Fuck 18th" and "Street Villains" from the car. Several gunshots were fired from what appeared to be the car's back seat, and the car sped away. One of the witnesses saw two people in the car, and identified Garcia as the car's driver. The witness testified that the shots came from behind the driver, and that after the shooting someone appeared to be trying to move from the car's back seat into the front passenger seat.

One of the teens—Danny Saavedra, then 16 years old—had been shot in the head. He died from the injury a few days later. The police determined that Saavedra was not a gang member.

The Apprehension of Garcia and Menéndez

The police responded a few minutes later. Hearing a radio broadcast about the shooting and the car's description, Officers Pratt and Beard went to what they knew to be an area of the Street Villains gang. There they saw a burgundy Honda Civic with two occupants stopped in an alley, with its backup lights on. When Pratt made eye contact with the driver—whom he later identified as Garcia—the car drove off, and the police followed. After the police activated their lights and siren, Garcia jumped from the driver's seat while the car was still moving, before it hit a parked car and stopped. Officers Pratt and Beard chased Garcia, but lost sight of him. Two other officers chased the passenger—Menéndez—between two houses, over a fence, and into an alley. After a short additional pursuit, Menéndez stopped and was taken into custody, about a half hour after the initial report of the shooting. Later that evening Garcia was stopped as he left an apartment in the area. He was taken into custody after he told the detective who stopped him that he was spending the night with a friend, whose name he said he could not remember. No gun was found.

Forensic Evidence

The Honda had been stolen. Of the 25 latent fingerprints and palm prints lifted from its interior, 10 were matched to specific individuals, of which three were identified

as belonging to Menéndez; none were matched to Garcia. Residue taken from Menéndez's right hand contained particles of certain chemicals (lead and antimony) that are consistent with gunshot residue, but are not sufficient (without barium) to identify their source as gunshot residue.

Menéndez's Statement to Police

Menéndez was taken to the 77th Street police station before being transferred to a juvenile facility. At the station, Detective Paula Chavez advised Menéndez of his *Miranda* rights, then asked him if he wanted to talk about what had happened. Menéndez said no, that he wanted an attorney. Detective Chavez then told Sergeant Vach and Officer Cleary to take Menéndez downstairs to be booked (fingerprinted, photographed, and asked some questions by the jailer), advising them that Menéndez had invoked his right to an attorney.

Sergeant Vach found Menéndez's demeanor to be "distant," and was concerned that he might be subject to mood swings, from anger to sadness, and to violence.[2] In order to calm Menéndez and to build rapport with him, Vach asked him basic questions and explained the booking process. Vach waited with Menéndez in a basement holding cell while his partner held a place in the booking line.

Vach asked Menéndez whether he was okay, and Menéndez said he was not. Vach asked him what was wrong; Menéndez then said he was angry and upset, for unknown reasons, because of problems with his family at home, and because of problems dealing with an uncle who had been shot. Menéndez also said he was feeling bad because he had shot somebody.

Vach then asked Menéndez whether he had been "Mirandized"—advised of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*)—to which Menéndez responded that he had. And Vach asked whether he had

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[2] Menéndez was then 14 years old, approximately 120 pounds and five feet and five inches tall, and was handcuffed.

requested an attorney, to which Menéndez said that he had, because he did not fully understand his rights and some of the "big words" the detective had used.[3]

As Menéndez, Vach, and Cleary went through the booking process, Menéndez said he was talking to Vach about his anger and problems because he felt more comfortable with Vach. He repeated a number of times his statement that he had shot someone, saying he had been in a dark-red Honda with two other individuals, that they had dropped off the one with the gun just before the police had pulled up, that they had then crashed the car when the police chased them, and that they had run from the police. According to Sergeant Vach, during the 30 minutes in the holding tank and another 30 minutes in the booking process Menéndez repeated at least three times that he had "shot a guy."

During the booking process, Sergeant Vach did not give *Miranda* warnings to Menéndez, and did not advise him to stop talking because he had requested an attorney. He did ask Menéndez whether he wanted to talk to the detectives again, to which Menéndez responded that he did. Vach said that he had attempted to use a pocket recorder to record Menéndez's statements, but he had destroyed the recording after determining that it was unintelligible. After booking Menéndez, Vach returned him to Detective Chavez, and briefed Chavez on what Menéndez had said during the booking process. Sergeant Vach made no notes of his conversation with Menéndez.

Detective Chavez's report, containing a summary of what Vach had told her, indicated that Vach had said that Menéndez was involved in the shooting. But the report did not say that Vach had told her that Menéndez had said he had shot someone. About five months later, at Detective Chavez's request, Vach wrote his own report about his conversation with Menéndez.

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[3] Officer Vach had admittedly been told that Menéndez had invoked his *Miranda* rights.

Prosecution Gang Expert Testimony

Detective John Flores testified as an expert on street gangs in South Los Angeles, and specifically on the Street Villains (or "Calle Villanos") gang. In the course of extensive direct examination, Flores identified the Street Villains' history, organizational structure, territory, activities, and primary rival gangs, and he identified two crimes committed by specific Street Villains members during recent years. He testified about Street Villains' rivalries with other gangs and subgroups in the area, including 18th Street. He testified about how young gang members commit various crimes to prove themselves and show gang loyalty, and he described the way in which gang members typically commit drive-by shootings.

Based on his knowledge of Garcia and Menéndez and the Street Villains gang, as well as his conversations with them and the observation of their tattoos and the graffiti in its territory, Flores testified to his opinion that Garcia and Menéndez were members of the Street Villains gang, and that the drive-by shooting of Saavedra was done for the benefit of the Street Villains gang.

Garcia's Testimony

Appellant Garcia testified that on the day of the shooting he had left school early, that he had taken a bus to meet some girls, that he had later cruised the streets on his bicycle, and that he had then received a call from Menéndez. Garcia then went to the home of Noel Velasco to try to get a ride to meet Menéndez, who had said he was with some girls.

When Garcia arrived at Menéndez's location, most of the girls had left. Garcia, Menéndez, and Velasco then left in a car that Menéndez had—the stolen Honda Civic—on their way to another location to find some girls. On the way, at Velasco's instruction from the back seat, with Garcia driving and Menéndez in the passenger seat, Garcia made a short detour past a crowd of people. A few blocks later, over his objections, Garcia acceded to Velasco's instruction to turn around. As the car again passed the crowd, he

heard three pops, which he later figured out had come from inside the car. He had seen no gun. As he sped away, someone in the car said "Street Villains."

Garcia then stopped the car, got out, and began to argue with Velasco, asking him why he had not told them he was going to "do something like that." Velasco then threatened to shoot Garcia or his family if he talked about it again. Garcia told them he was going home, the three of them got back into the car, and he dropped Velasco off at the end of an alley near his house. Velasco walked away, adjusting something at his waist, then began running. Garcia looked back, saw a police car coming, and drove off. He jumped from the car while it was still moving, before it crashed, and was later arrested. At that time he did not know that anyone had been shot.

When he was questioned by the police, Garcia first said he had been at a friend's house. Later, after learning that someone had been shot, he asked Detective Chavez for his mother, and when he was told she was on her way to the station, he broke down crying, and he told Chavez what had happened that night.[4] He told them that he was driving the car, and that when they rode through the crowd the second time, Menéndez had shot out the window, and had moved from the back seat into the front passenger seat. But that had not been the truth, he testified at trial; he had told the police that the shooter was Menéndez only because he was afraid of Velasco's threats to him and his family.[5] Garcia decided to tell the truth months later, after learning of Velasco's death.

Garcia admitted that he belonged to the Street Villains gang, and that 18th Street was among his gang's rivals.

Other Defense Evidence

Garcia presented the testimony of Connie Cerrillos that she had three children with Velasco, but that at the time of the shooting she had moved out of Velasco's home and

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[4] Garcia testified that he talked to the officers later that night after they told him "you don't want to spend the rest of your life in prison," that "you guys killed someone tonight," and "just cooperate with us and you will be home to your family soon."

[5] A transcript of Garcia's statement to police, including the statement that Menéndez was the shooter, is attached to Garcia's motion to suppress.

was pregnant with a child by a man named Pedro. Velasco was with the Street Villains gang, and Pedro was "18th Street." In August 2007 (about five months after the shooting of Danny Saavedra), Velasco was shot and killed.

Alex Alonso, a gang researcher, was called by Garcia to testify concerning the social structure of gangs in the region, including the Street Villains and 18th Street gangs. Based on the facts to which Garcia testified, it was his opinion that the shooting was committed for the benefit of the shooter, not for the benefit of the gang. And he opined that if Velasco's girlfriend had been impregnated by an 18th Street gang member, Velasco would have committed the shooting out of personal animosity rather than gang rivalry.

The Verdicts and Sentences

The jury found each of the appellants guilty of first degree murder, and found true the special circumstance allegations that the murder was a drive-by shooting (§ 190.2, subd. (a)(21), that it was committed for the benefit of a criminal street gang (§§ 186.22, subd. (b)(1)(C)), and that a principal in the crime personally and intentionally discharged a firearm (§ 12022.53, subds. (b)–(e)).

The jury was unable to agree on the special circumstance allegations that either Garcia or Menéndez had intentionally killed the victim as an active participant in a criminal street gang and that the murder was carried out to further the activities of the gang. (§ 190.2, subd. (a)(22).) The jury also made no findings on the allegation that Menéndez had personally and intentionally used and discharged a firearm. (§12022.53, subds. (b)–(d).) The court declared a mistrial on the allegations as to which the jury made no findings.

The court sentenced both Garcia and Menéndez to prison for indeterminate terms of 50 years to life, consisting of 25 years to life for first degree murder, plus 25 years to life for the firearm enhancements.[6] The court stayed the remaining section 12022.53

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[6] Because Menéndez was 14 years old at the time of the crime, the section 190.2, subdivision (a)(21) special-circumstance finding called for an enhanced sentence of 25

enhancements, struck the section 186.22 enhancement, ordered various fines and assessments, and granted the appellants presentence custody credits.

DISCUSSION

I. The Appellants' *Batson/Wheeler* Motion Was Properly Denied

A. *Batson/Wheeler* Motion Requirements

During the jury selection process the prosecution exercised a peremptory challenge—the prosecution's ninth—to dismiss a potential juror, an African-American man. Counsel for Garcia interrupted the jury selection to make a *Batson/Wheeler* motion, contending that the prosecution had used its peremptory challenges to systematically dismiss African-Americans from the jury. Menéndez joined in the motion.

The use of peremptory challenges to systematically exclude potential jurors of a cognizable group—such as race—violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*).) It also violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 272 (*Wheeler*), disapproved on other grounds in *Johnson v. California* (2005) 545 U.S. 162, 168, 173 [125 S.Ct. 2410, 162 L.Ed.2d 129].) Peremptory challenges may be used to remove potential jurors that a party believes to be unsympathetic or prejudiced without giving a reason for the challenge; however the use of the peremptory challenges is subject to the mandates of the state and federal constitutions. "A party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias." (*People v. Fuentes* (1991) 54 Cal.3d 707, 713; see Code Civ. Proc. §§ 231, 231.5; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1277 & fn. 5.)

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years to life under section 190.5, subdivision (b). As to Garcia, the court exercised its discretion to set aside the section 190.5, subdivision (b) special-circumstance sentence of life without possibility of parole, and imposed the same 25 years-to-life enhanced sentence.

In ruling on a *Wheeler* motion, the trial court begins with a presumption that an exercise of a peremptory challenge is constitutionally permissible. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 278; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1009.) In order to overcome that presumption, the party opposing the peremptory challenge "must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Johnson v. California*, *supra*, 545 U.S. at p. 168, fn. omitted.) Once the party has made out that prima facie case of discriminatory purpose in the use of the challenge, "the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." Third, "'[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Ibid.*; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1008-1009.)

The initial prima facie showing of discriminatory purpose is established by a showing that "the totality of the circumstances" create a reasonable inference of discriminatory intent. (*People v. Davis* (2009) 46 Cal.4th 539, 582.) After the opposing party has proffered its explanation for its use of the peremptory challenge, the issue becomes whether the explanation is race-neutral, and whether the trial court finds it credible. (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 251-252 [125 S.Ct. 2317, 162 L.Ed.2d 196].) In making that determination, the trial court may consider its own observations of the process, the reasonableness or improbability of the explanation given for the use of the peremptory challenge, and whether the explanation seems to be based on accepted trial strategy. The third-step question for the trial court is one of credibility and plausibility; the ultimate burden of persuasion regarding racial motivation lies with the opponent of the strike, in our case, defendants Garcia and Menéndez. (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 612-613.)

The *Wheeler* motion in this case was prompted by the prosecution's exercise of a peremptory challenge to strike Juror No.7873 from the panel of prospective jurors. Juror No. 7873 had identified himself as a married electrical engineer living in Gardena, with a wife who was employed as a budget analyst and no adult children.[7] He said that two of his close friends are officers in the Los Angeles Police Department, and he had volunteered that he does not "buy into the idea" that police officers don't "have a stake in a case," or are more honest than others. On inquiry, he explained that he had "grown up with the belief" that "officers have lied," and that he would not necessarily tend to believe an officer's testimony over the testimony of a gang member "just because he or she is an officer." When asked about negative experiences with police officers, he recounted an incident in which he believed he was pulled over by an officer "because I was Black." He also said that he did not like being searched when he had visited a cousin in prison (although he conceded the search was necessary); however he had no reason to believe that the cousin had been treated unfairly with respect to his incarceration.

Making the *Wheeler* motion with respect to Juror No.7873, Garcia's counsel argued (out of the jury's presence) that the record of the prosecution's challenges showed a prima facie case of discriminatory purpose: "The District Attorney has used eight peremptories, of which he's excused a female Black, another female Black, and now a male Black. There are only a few Blacks in all the jury pools collectively."[8]

The trial court responded that "[i]t may be some prima facie showing"—thereby indicating its acceptance that the totality of the circumstances at least arguably gave rise to a prima facie inference of discriminatory purpose in the prosecution's exercise of peremptory challenges, and satisfied the first element of the three-step *Batson/Wheeler* process. The court then moved to step two, asking the prosecutor to "go ahead and explain it."

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[7] We use juror badge numbers to identify the potential jurors, although in the record they are sometimes identified by seat number.

[8] The parties agree that Garcia's counsel had miscounted; at that time the prosecution had exercised nine peremptory challenges, not eight.

Responding to the trial court's request to "explain it," the prosecutor said that the reason he had excused Juror No.7873 "was that [Juror No.7873] was upset at law enforcement"; he felt he had been pulled over because he was Black; and "he felt it necessary to give the answer he doesn't buy into police officers are always honest." The prosecutor also disputed the assertion of defense counsel that he had peremptorily excused three African Americans. "I have down [apparently in his notes] that the second peremptory challenge I used was a female Black. I didn't know that there was another Black individual."[9]

The trial court did not address the apparent conflict with respect to how many Blacks had been peremptorily excused. Instead, it simply said that it found the prosecutor's explanation to be credible: "[T]he District Attorney has justified his position here, and he has a basis for the excusal." The "full reason" for the prosecution's discomfort with this juror, the trial court concluded, was not "just because he's Black."

Garcia and Menéndez contend on appeal that their motion fulfilled the first step of the *Batson/Wheeler* requirement, constituting a prima facie showing of purposeful discrimination in the prosecution's dismissal of Black potential jurors and dispelling the presumption that its use of peremptory challenges—not just of Juror No.7873, but also of the two earlier-excused African Americans, jurors No. 7699 and No. 9444—was constitutionally permissible. They contend that because the prosecution proffered an explanation only for excusing Juror No.7873—and not jurors No. 7699 and No. 9444—from the panel, the prosecution's explanation failed to satisfy its step-two burden under the *Wheeler* evaluation process, and therefore was necessarily fatally deficient even if the prosecutor's explanation were sufficient with respect to Juror No.7873.

Finally, they contend, the trial court erred with respect to the third step of the process, by failing to properly evaluate the prosecution's justification even with respect

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9 Garcia's counsel responded that she believed that the third Black excused by the prosecution "was seated—I believe she was seated in seat three in the back." The record shows that the prospective juror who had earlier occupied seat three was juror No. 7699, a female.

to Juror No.7873. They argue that the prosecution's explanation for excusing Juror No.7873, although plausible when viewed in isolation, actually "supports the conclusion that the prosecutor was allowing race to influence his decisions to peremptorily challenge certain jurors" when viewed in the context of the prosecution's challenges to other jurors, including jurors No. 7699 and No. 9444. These errors, they contend, require reversal of their convictions.

"Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.]" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613; *People v. Ward* (2005) 36 Cal.4th 186, 200.) "'So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' [Citation.]'" (*People v. Hamilton* (2009) 45 Cal.4th 863, 901.) A trial court's ruling on race-neutrality will be upheld unless the record shows it to have been "'clearly erroneous,'" a standard of review that is equivalent to the "'substantial evidence'" standard applied by California courts for review of pure issues of fact. (*Id*. at p. 901, fn. 11.)

B. Evaluation of the *Batson/Wheeler* Motion

1. The denial of motion with respect to Juror No.7873.

We conclude that the trial court correctly evaluated the prosecutor's response with respect to Juror No.7873, and that the evidence supports its determination that the peremptory challenge to Juror No.7873 was not improperly based on racial motivations. The court assumed that the record of the voir dire might have been sufficient to satisfy the first step requirement of a prima facie showing of improper discrimination in the prosecution's exercise of its peremptory challenge to Juror No.7873; it therefore called upon the prosecutor to explain its reasons for the disqualification, asking the prosecutor to "go ahead and explain it." As recounted above, the prosecutor responded that he exercised the peremptory challenge because Juror No.7873 was "upset" with law enforcement, believed that he had been profiled by the police for being Black, and had

volunteered his belief that police officers are no more honest or less likely to lie than are other witnesses.

Once the prosecutor identified those factors as its grounds for striking the potential juror, the trial court had to make "'a sincere and reasoned attempt'" to evaluate the credibility of the prosecutor's explanation in light of the then-known circumstances of the case. (*People v. Hamilton, supra*, 45 Cal.4th at p. 907.) The question before the court was whether the reason given for the peremptory challenge was legitimate "in the sense that it would not deny defendants equal protection of law," or was it "a disingenuous reason . . . that was in actuality exercised solely on grounds of group bias?" (*People v. Reynoso* (2003) 31 Cal.4th 903, 925.)

The evidence is sufficient to show that the trial court fulfilled that duty. The court expressly accepted the prosecutor's explanation as credible, explaining that: "the District Attorney has justified his position here, and he has a basis for the excusal" that does not rest on an improper group bias, and that is sincere, legitimate, and was not exercised solely on grounds of group bias." (*People v. Reynoso, supra*, 31 Cal.4th at p. 924.)[10]

Garcia and Menéndez concede that, "standing alone," the prosecutor's challenge to prospective Juror No.7873 "might not be remarkable." However, in the trial court Menéndez's counsel argued that the voir dire record casts doubt on the prosecution's explanation: Juror No.7873's belief that police officers do not always tell the truth is consistent with "all other people's response, irrespective of race." And Juror No.7873's belief that he had been pulled over by a police officer because of his race does not justify excusing him as a juror, counsel argued, because he had conceded that the officer had treated him well and "the upshot of the whole incident was that it was positive."

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10 This would be true even if the reasons for the trial court's conclusion were not clear from the record. "The impracticality of requiring a trial judge to take note for the record of each prospective juror's demeanor with respect to his or her ongoing contacts with the prosecutor during voir dire is self-evident." (*People v. Reynoso, supra*, 31 Cal.4th at p. 929.)

As the prosecutor and the trial court pointed out, however, the *Wheeler* standard is not whether the prosecutor's stated grounds are objectively sound; the test is whether they are credibly based on something—anything—other than a racial motivation. A prosecutor's explanation of reasons need not be objectively reasonable; it may be based on hunches, on arbitrary disfavor, or on trivialities. A trial court therefore is entitled to accept any explanation for striking the prospective juror, as long as it does not reveal impermissible group bias, or constitute a pretext to conceal such bias. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; see also *People v. Reynoso*, *supra*, 31 Cal.4th at pp. 917, 924 [focus of trial court's examination is on the subjective genuineness of a race-neutral reason given for a peremptory challenge, not on objective reasonableness of the reason].) A "'"'legitimate reason'"'" in the third step of the *Wheeler* inquiry is not necessarily a reason that "'makes sense'"; it is "'a reason that does not deny equal protection.'" (*Id.* at p. 924.)

"'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." [Citation.]' [Citation.]" (*Miller–El v. Cockrell* (2003) 537 U.S. 322, 339.) Therefore, on direct review the trial court's factual findings are accorded great deference and will not be overturned unless clearly erroneous. (*Id.*, at p. 340.)

The trial court thus did not have to agree with the prosecutor's judgment in excusing Juror No.7873; it is enough that the court accepted as credible and nonpretextual the prosecutor's indication that "this juror, black, white, or whatever, has given answers that the District Attorney's uncomfortable about," based upon reasons

other than "just because he's Black."[11] The court's conclusion is not contradicted by the voir dire record, and therefore is not clearly erroneous.

2. Sufficiency of response to prima facie showing

The appellants argue that a comparative analysis of the grounds for the prosecution's challenge to Juror No.7873 with its discharge of other Black jurors and its failure to discharge other White jurors demonstrates disparate treatment of Black and White potential jurors, and undermines the credibility of the grounds given by the prosecutor for discharging Juror No.7873. The third stage of a *Wheeler* review must include a comparative analysis of the treatment of other prospective jurors, in which the grounds identified by the prosecutor must be also be compared with the records of other potential jurors that the prosecution did, and did not, dismiss. The credibility of a prosecutor's stated reasons "can be measured by . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v.Cockrell*, *supra*, 537 U.S. at p. 339.) "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step" (*Miller-El v. Dretke*, *supra*, 345 U.S. at p. 241.; *People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)

In the trial court the defendants did not identify the statements of any other prospective jurors as indicating disparate treatment or a racial motivation in the prosecution's use of peremptory challenges. Nevertheless a comparative analysis of juror responses is required—even for the first time on appeal—if the record contains evidence sufficient to permit such comparisons, and the defendant relies on them. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 902, fn. 12; *People v. Lenix*, *supra*, 44 Cal.4th at p. 607.) However, a reviewing court need only consider the portions of the voir dire

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[11] The trial court explained to counsel that it did not necessarily agree with the prosecutor's decision to strike juror No. 7873: "Well, Mr. Forbes, if it was up to me, maybe I'd keep him, but I'm not prosecuting this case."

record that the appellants identify as indicating disparate treatment. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624.)

The appellants first compare the prosecution's treatment of Juror No.7873 with that of the two other allegedly Black prospective jurors identified by their trial court motion, jurors No. 7699 and No. 9444. First, they argue, the prosecutor's proffered explanation of his grounds related only to Juror No.7873; the explanation therefore left unexplained the grounds for challenging jurors No. 7699 and No. 9444, and left unrebutted the prima facie showing of discrimination in the exercise of its peremptory challenges as to those prospective jurors.

Second, the appellants contend that comparing these three prospective jurors, whom they characterize as Black, with those of some other jurors that they characterize as White, demonstrates disparate treatment in the discharge of these Black jurors, and undermines the prosecutor's professed racially neutral grounds for discharging the Black jurors.

We are not persuaded.

With respect to the first point, assuming (without deciding) that a prima facie showing of racial bias discrimination arose from the prosecution's peremptory disqualification of Juror No.7873, as the trial court tentatively concluded, the record does not establish that a prima facie showing of racial bias discrimination arose from the prosecution's peremptory disqualification of either Juror No.7699 or Juror No.9444. For that reason—confirmed by the statements and conduct of the trial court and the parties—the prosecution was not called upon to explain the grounds for its peremptory disqualification of those prospective jurors. Moreover, we find the record insufficient to demonstrate racial bias in the exercise of the prosecution's peremptory disqualifications of Juror No.7699 or No. 9444, as well as Juror No.7873.

The defendants presented their entire *Wheeler* motion in two short sentences: "The District Attorney has used eight peremptories, of which he's excused a female Black, another female Black, and now a male Black. There are only a few Blacks in all

the jury pools collectively." Although the motion might have been understood to imply that the prosecution had been improperly motivated by racial grounds in its exercise of peremptory challenges to each of these three prospective jurors, it apparently was not.

The trial court responded to the motion by observing that "it"—apparently the disqualification of Juror No.7873, the event that prompted the motion—might be sufficient to constitute a prima facie showing of discrimination. On that basis the court asked the prosecutor to explain "it"—again, the disqualification of Juror No.7873. The prosecutor apparently understood the court's request to seek only his explanation for excusing Juror No.7873, for his response did not mention the earlier disqualifications. The trial court, too, apparently understood the motion to relate to the disqualification of Juror No.7873, not the earlier disqualifications, for the court indicated its satisfaction with the prosecutor's explanation for excusing Juror No.7873 alone.

If Garcia's counsel had intended when she announced the *Batson/Wheeler* motion that her reference to Juror Nos. 7699 and 9444 signaled her contention that their disqualification, too, was being challenged as prima facie evidence of discrimination, rather than for comparison with the dismissal of Juror No.7873, she did not make that clear. Nor did she clarify the point when the trial court's response made its contrary understanding apparent. And Menéndez's counsel indicated no such intention when the trial court expressed its satisfaction with the sufficiency of the prosecutor's response by saying that it was sufficient to resolve the issue, while inviting additional argument "if either party wants to be heard further . . . ." Instead, Menéndez's counsel proceeded to argue that Juror No.7873's voir dire responses should not be understood to be anti-police, and should not justify his peremptory disqualification. But no one said that the *Wheeler* motion also related to the discharge of Juror No.7699 or No. 9444; and no one argued that the prosecutor's explanation failed to address the prima facie showing of discrimination with respect to them. Counsel declined the court's invitation to present further argument, and the trial court confirmed its initial suggestion that the prosecutor had "adequately explained his position" with respect to the issues raised by the motion.

If the appellants' counsel had articulated their current contention in the trial court—that discrimination is shown by the peremptory disqualification of jurors other than Juror No.7873—the prosecution would then have been in a position to offer contrary argument and evidence to influence the trial court's consideration. But the absence of any such contention deprived the trial court of the opportunity to accept or reject the factual bases for the parties' positions on that issue, and to exercise its discretion based on its determinations. In light of the appellants' silence on this issue in the trial court, we are unable to conclude that the trial court erred by finding the prosecutor's explanation sufficient to address the issues raised by the motion.

3. Comparison of Juror No. 7873 with other prospective jurors

The appellants' second contention is equally unavailing. A comparison of the voir dire responses of the other prospective jurors with those of Juror No.7873 does not render the trial court's ruling unsupported. The appellants are entitled to challenge the court's ruling based on a comparative analysis of juror responses only to the extent that the record contains evidence sufficient to support its proposed comparisons. (*People v. Hamilton, supra*, 45 Cal.4th at p. 902 & fn. 12; *People v. Lenix, supra*, 44 Cal.4th at p. 607.)[12] Here, it does not.

The record indicates that Juror No. 7873 was Black; he indicated as much during voir dire when he said he had been pulled over "because I was Black." But when the

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[12] Juror No. 7699 was a pre-school teacher, married, with no adult children and no previous jury experience, living in El Monte. Her brother had been imprisoned for two years for child endangerment—a circumstance that she said had upset her and her family. She believed that her brother had been treated unfairly, but did not identify the police or the courts as the culprit. When pressed, she confirmed her belief that the source of her brother's troubles was his partner's untruthful complaint against him. And when asked whether her brother's situation would affect her ability to sit as a juror in this case, she replied, "I don't think so." Sometime later, the prosecution exercised a peremptory challenge to excuse her from the panel of prospective jurors.

Juror No. 9444 was an unmarried female undergraduate communications college student. Her uncle had been charged with DUI; she believed that he had been treated fairly. She said that she had heard on the news about the 18th Street gang, but thought that she nevertheless could be fair in evaluating the evidence.

argument of Garcia's counsel characterized the earlier-discharged Jurors No. 7699 and No. 9444 as female and Black, the prosecutor challenged that contention, representing that his notes showed that he had excused only one Black female. "I didn't know that there was another Black individual." That statement, construed liberally, can be understood to concede that Juror No. 7699 was Black; but appellants point to nothing in the record that indicates the apparent racial characteristics of Juror No. 9444, and we have found nothing.

In their briefs, the appellants also attempt to contrast the peremptory discharge of Juror No. 7873 with the prosecution's failure to challenge three supposedly White jurors, Juror Nos. 8066, 9603, and 0285. But with respect to these prospective jurors, too, there is nothing in the record to illuminate their apparent race or racial characteristics.

Juror No. 8066 answered the court's voir dire inquiry by responding that "over thirty years ago" she had been stopped by the police for driving with her lights off. She also recounted an incident in which her minor son had been driving to school with her husband when they were pulled over for not wearing seat belts. She said that the police had taken her son from the car, searched him, and "were trying to put him in the system." She had been upset, but had made no formal complaint. She responded in the negative when the court asked whether she would hold that against any officer testifying in this matter.

Juror No. 9603 stated that her brother had been repeatedly arrested for offenses such as disorderly conduct, intoxication, theft and drugs, and a nephew had been convicted of burglary and drug charges, had been incarcerated, and had been on probation.[13] However, she believed that her brother had been given "a lot of breaks"—too many, she believed ; and her nephew had been treated "like everyone else in the system."

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[13] Respondent suggests in its brief that the court reporter erred in identifying Juror No. 9603 as the proposed juror whose cousin had been incarcerated and had served on probation. The briefs do not say why it would matter, however, and we find no reason to consider the issue.

Juror No. 0285 said that he had a cousin who had been arrested for assault after severely injuring his roommate in a fight. The incident had occurred in New Jersey; he was not at all close with the cousin, and he did not know enough about it to say whether the cousin had been fairly treated.

The record relating to these prospective jurors is insufficient to show that Juror No. 9444 was Black, that Juror Nos. 8066, 9603, or 0285 were White, or the nature of the racial composition of either the jury as seated, or the venire from which it was selected. In prosecuting a *Wheeler* motion, it is the moving party's burden to "make as complete a record of the circumstances as is feasible," and to "establish that the persons excluded are members of a cognizable group" to the extent feasible. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280; see *People v. Lenix*, *supra*, 44 Cal.4th at p. 610, fn. 6 ["When a *Batson/Wheeler* motion has been made, it is helpful for the record to reflect the ultimate composition of the jury."].) Without some basis in the record, the appellants cannot demonstrate error in the trial court's ruling on the *Batson/Wheeler* motion. (*People v. Morris* (2003) 107 Cal.App.4th 402, 408 [defendant cannot demonstrate error without identifying the apparent race of the challenged jurors, and showing that there were no race-neutral grounds for their exclusion].)

The record's uncertainty about the apparent racial characteristics of the prospective jurors who had and had not been peremptorily discharged could easily have been resolved, had it been raised in the trial court. It was the defendants' burden to support their motion with a prima facie showing of discrimination, and to ensure that the record would be sufficient to reflect that showing. (*People v. Hamilton, supra,* 45 Cal.4th at p. 902, fn. 12; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 607, 612-613.) Because they sought no clarification of the record as to the other prospective jurors' apparent racial characteristics, there can be no assumption that the jury or the jury venire

had any particular racial composition, that Juror No. 9444 was Black, or that Juror Nos. 8066, 9603, or 0285 were White, as the appellants contend.[14]

We also conclude, however, that *even if* the jurors and jury panel were shown to have the apparent racial composition and characteristics that the appellants ascribe to them, those circumstances nevertheless would not be sufficient to overcome the trial court's determination that the prosecution's use of peremptory challenges to strike prospective jurors was grounded on reasons other than racial bias.

A prosecutor may legitimately use peremptory challenges to excuse potential jurors that might be believed to have negative experiences with the police, or with the criminal justice system. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 703, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22 [proper to challenge juror with negative experiences with the criminal justice system]; *People v. Walker* (1988) 47 Cal.3d 605, 625-626 [negative experiences with police].) The prosecutor in this case was certainly entitled to conclude that Juror No. 7873—who had identified himself as a victim of a racially motivated traffic stop—was within that category, even though the incident had not turned out as badly as he had expected. And the prosecutor was also entitled to distrust Juror No. 7873's objectivity and judgment with respect to police-officer witnesses, after he had volunteered his belief that the police cannot be trusted to tell the truth.

The trial court concluded that the prosecutor's concerns with this prospective juror, whether wise or not, were grounded in legitimate trial strategy concerns rather than racial bias. On this record, we cannot say that the trial court's conclusion is unfounded or without evidentiary support.

Juror No.7699 had told of her upset concerning what she believed to be the unfair incarceration of her brother. That experience, which had (like the experiences of some

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[14] An attorney's argument is not evidence. (*People v. Clark* (1993) 5 Cal.4th 950, 1033, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn 22.)

other of the prospective jurors) had involved someone other than herself, did not render the prosecutor, or the trial court, unable to distinguish her circumstance from that of Juror No. 7873, particularly in light of her response that she did not believe that experience would affect her performance as a juror.

So too, the fact that the prosecutor did not excuse Juror Nos. 8066, 9603, or 0285, did not render the court powerless to conclude that the peremptory discharge of Juror No. 7873 had not been racially motivated. Even if these jurors had been shown to be White, Juror No. 7873's voir dire responses distinguish him from those jurors in at least two important respects: Each of those jurors told of incidents involving others; only Juror No. 7873 had identified himself as having been a victim of law enforcement racial profiling. And only Juror No. 7873 had volunteered a belief that police officers cannot be trusted to tell the truth.

The Supreme Courts of both California and the United States have cautioned that "comparative juror analysis on a cold appellate record has inherent limitations" that are not shared by the parties and the trial court, who have watched and listened to the testimony as it was delivered. "Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) And these courts have noted additionally that the decisive issue—whether counsel's race-neutral explanation should be believed—will often turn on the trial court's evaluation of the prosecutor's and the prospective jurors' states of mind based on demeanor and credibility, which "will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent." (*Id.* at p. 624, citing *Hernandez v. New York* (1991) 500 U.S. 352, 365 [111 S.Ct. 1859, 114 L.Ed.2d 395].)

II. The Trial Court Did Not Err In Admitting Evidence Of Menéndez's Jailhouse Statements.

The United States Supreme Court held in *Miranda*, *supra*, 384 U.S. 436, that an accused has a Fifth and Fourteenth Amendment right to have counsel present during

custodial interrogation," and that in order to implement that right, any custodial interrogation must be preceded by advice to the accused that he has a right to remain silent and a right to the presence of an attorney. (*Id.* at p. 479.) If the accused indicates that he wishes to remain silent, "the interrogation must cease." (*Id.* at p. 474.) If he requests counsel, "the interrogation must cease until an attorney is present." (*Ibid.*; *People v. Gamache* (2010) 48 Cal.4th 347, 384-385.) Once a custodial suspect invokes his right to an attorney, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378]; *People v. Clark*, *supra*, 5 Cal.4th at pp. 984-985.

While Menéndez was in custody, awaiting booking in a basement holding area with Sergeant Vach, he said he was feeling bad because he had shot somebody, repeating that statement a number of times during the next half hour. It is undisputed that these incriminating statements came after Menéndez had been advised of his *Miranda* rights, after he had said that he did not wish to talk about what had happened without an attorney, and after Sergeant Vach had initiated further conversation with him about his family and his feelings.

If the police initiate or reinitiate discussions relevant to the investigation after a defendant's invocation of *Miranda* rights, without a break in custody, "any further statements by the defendant are presumed involuntary and rendered inadmissible. [Citations.]" (*People v. Gamache, supra*, 48 Cal.4th at p. 385.) It is the prosecution's burden to establish that the defendant knowingly and intelligently waived his privilege against self-incrimination. (*People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034.) "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410];

Colorado v. Spring (1987) 479 U.S. 564, 573 [107 S.Ct. 851, 93 L.Ed.2d 954].) Once warned, however, a suspect "'is free to exercise his own volition in deciding whether or not to make a statement to the authorities.'" (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1033.) Statements that are voluntarily made are not subject to the requirements of *Miranda*. (*People v. Ray* (1996) 13 Cal.4th 313, 337.)

Menéndez contends in this appeal that his incriminating custodial statements were made as a result of interrogation in violation of his *Miranda* rights, that they were involuntary, and that their improper use at trial requires reversal of his conviction.[15] The question here is whether the evidence is sufficient to support the trial court's implied determination that Sergeant Vach's conversations with Menéndez while waiting for booking did not constitute "interrogation," and therefore whether it was sufficient to dispel the presumption that Menéndez's responses were involuntary and rendered his incriminatory statements admissible. "In reviewing the trial court's denial of a suppression motion on *Miranda–Edwards* grounds, 'it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.'" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 385.)[16]

Sergeant Vach testified that he did not ask Menéndez anything about the charges against him or events leading to his arrest, and that he had no intention to evoke responses on those subjects. However, "interrogation" includes not just direct

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[15] Although Garcia joins in Menéndez's brief on the issue, Garcia does not identify how he might have been prejudiced by any error in the admission of Menéndez's statements. Neither Garcia nor Menéndez contends on appeal that the trial court erred in declining to sever their cases for trial.

[16] "'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.] We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*. [Citations.]" (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1033.)

questioning about the crimes of which the accused is suspected, but also its "'functional equivalent,'" consisting of "'words or actions on the part of the police that "are reasonably likely to elicit an incriminating response from the suspect"'" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 387; *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 64 L.Ed.2d 297].) Whether a particular instance amounts to an interrogation depends on the situation, including the length, place, and time of the questioning, the nature of the questions, the conduct of the police, and any other relevant circumstances. (*People v. Terry* (1970) 2 Cal.3d 362, 383.) "[T]he police 'may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.'" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 388; *People v. Clark*, *supra*, 5 Cal.4th at p. 985.)

The evidence with respect to Menéndez's statement that he had shot someone was presented through the testimony of Sergeant Vach at a pretrial hearing on the defendants' motion to suppress the statement. Sergeant Vach testified that when he received Menéndez for booking, he had been told only that Menéndez had been charged with a shooting, either attempted murder or murder, that Menéndez was a juvenile, and that he had been advised of his *Miranda* rights.

Vach observed that Menéndez was withdrawn and depressed, "had his head down and at some points he would also be angry." To put Menéndez at ease, because "he was so young" and was unlikely to know what to expect, and "to ensure that, you know, everyone's safe including officers and the defendant himself," Vach explained the process to Menéndez, where they were going, what would happen, and how long it would take. As they walked downstairs to the jail, Vach asked Menéndez questions about his family and parents, "just to put him more at ease, to get him thinking about other things in case he was thinking about harming an officer or harming himself."

When they reached a holding area in the jail, Vach and Menéndez sat together to wait their turn while another officer went to arrange for the booking.

At that point, because Menéndez's demeanor was unchanged, and because he was still concerned about safety issues, Vach asked him if he was okay. He intended "to kind of draw up [Menéndez's] feelings, how he was feeling, if he was angry or upset, if he was angry at myself or just himself." Menéndez's response to the question was "no," he was not okay, which Vach took as a "red flag."

When Vach asked Menéndez what was wrong, Menéndez explained that he was angry and upset, and was angry all the time. At some point Menéndez changed the subject to a specific problem he was having at home with his mother, and then to a problem he was having "in dealing with an uncle who was shot."

After five or ten minutes of talking about those subjects, without interruption by Vach, Menéndez concluded by saying that he was also upset because he had shot someone. At that point Vach interrupted Menéndez to ask whether he had spoken to the detectives about that, and to ask whether his *Miranda* rights had been read to him and whether he had requested an attorney—to which Menéndez responded that he had. Vach testified that in asking questions about Menéndez's family and whether he was okay, he did not intend to have Menéndez talk about the charges against him or the events leading to his arrest.[17]

The court denied the defendants' motion to suppress Menéndez's statement that he had shot someone.

Not all conversation between an officer and a suspect constitutes interrogation. "In deciding whether particular police conduct is interrogation, we must remember the

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[17] Vach testified that it was essential for the safety of the accused and the officers that he observe Menéndez's demeanor, because "at some point in time during the booking process he will be unhandcuffed and has access to things that can harm other people." He may need additional officers, a separate facility or "maybe a padded cell"; and "he may have to be strapped down if he's suicidal or he chooses to physically harm someone else . . . ." Vach conceded, however, that he was a fit, 34-year-old man, 5 feet 10 inches tall and about 200 pounds, accompanied by another officer during all but about five minutes, while Menéndez was "a 14-year-old skinny little kid," whose hands were cuffed behind his back.

purpose behind our decisions in *Miranda* and *Edwards*: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." (*Arizona v. Mauro* (1987) 481 U.S. 520, 529-530 [107 S.Ct. 1931, 95 L.Ed.2d 458].) "Where government actions do not implicate this purpose, interrogation is not present." (*People v. Clark*, *supra*, 5 Cal.4th at p. 985.)

If the defendant initiates a statement to police after having requested counsel, "'nothing in the Fifth and Fourteenth Amendments . . . prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.'" (*People v. Bradford*, *supra*, 14 Cal.4th at p. 1033; *Edwards v. Arizona*, *supra*, 451 U.S. at p. 485.) "The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response." (*People v. Clark*, *supra*, 5 Cal.4th at p. 985; see *People v. Mickey* (1991) 54 Cal.3d 612, 645, 651 [no interrogation found where defendant lost composure and made incriminating statements when police responded to his question regarding the burial of his victims].)

"In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.'" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) The defendants argue that Vach's questions to Menéndez while awaiting booking rendered Menéndez's incriminatory statement involuntary and his waiver of his rights under *Miranda* neither knowing nor intelligent. However, the only evidentiary support cited for this contention is that Menéndez was young, that he had little or no experience in the criminal justice system, and that Sergeant Vach had asked about his family—"a subject sensitive to any person but all the more so to a boy."

A prolonged police interrogation may be coercive. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398–399 [98 S.Ct. 2408, 57 L.Ed.2d 290] [statements were not the product of free and rational choice, where seriously wounded defendant was questioned for more than three hours, was unable to think clearly, and had repeatedly stated that he did not wish to speak without a lawyer present]; *Spano v. New York* (1959) 360 U.S. 315, 320–

324 [79 S.Ct. 1202, 3 L.Ed.2d 1265] [confession by young, emotionally unstable man after eight hours of interrogation during which he requested an attorney and repeatedly refused to answer questions, was involuntary]; but see *People v. Carrington* (2009) 47 Cal.4th 145, 171-176 [eight-hour interrogation about crimes not coercive of confession].) However, the evidence of Sergeant Vach's conversation with Menéndez shows no interrogation (much less prolonged interrogation), and no coercion. Vach did not address or inquire about anything concerning Menéndez's conduct, the events leading to his arrest, or anything else that could be considered an attempt to elicit a confession.

This case is thus far easier than *People v. Clark*, *supra*, 5 Cal.4th 950. In that case, after invoking his *Miranda* rights the accused had asked the police about the likely prison term for murder, the charge for which he had been booked; a policeman responded that he had never seen anyone serve more than seven and one-half years. The defendant then said, "'I want this on the record. I'm guilty. I killed her. What do you want to know?'" (5 Cal.4th at p. 982.) In reviewing the defendant's contention that his confession was coerced in violation of *Miranda*, the court found that substantial evidence supported the trial court's determination that "there was no reason for [the policeman] to have known" that his response concerning possible penalties for murder would produce an incriminating response. (*People v. Clark*, *supra*, 5 Cal.4th at p. 985.) There, as here, the police had not raised the subject of the crime for which the defendant was arrested; they had not suggested that a confession would result in favorable treatment; there was no evidence of "'compelling influences, psychological ploys, or direct questioning'" aimed at obtaining an incriminating response. (*Id.* at pp. 985-986.)

In *People v. Ashford* (1968) 265 Cal.App.2d 673, the use of evidence of an incriminating statement by the defendant to a bailiff was upheld on appeal. (*Id.* at p. 685.) The appellants note that there it was the defendant, not the officer, who had initiated the conversation with the defendant. But who spoke first was not the issue. "Even under the interpretation of the evidence most favorable to defendant," the records showed only that the bailiff had said "'How's it going, Ashford?'" (*Ibid.*) Asking that

question, the court held, "falls far short" of the interrogation prohibited by *Miranda*. (*People v. Ashford*, *supra*, 265 Cal.App.2d at p. 685.)

Here, nothing in the record indicates that Menéndez's statements resulted from coercion or overbearing conduct on the part of the police. The record fully supports the trial court's implied findings, that Sergeant Vach's explanations of the booking process and inquiries to Menéndez about his family could not reasonably be construed as calling for an incriminating response, and that Menéndez's statement a few minutes later that he had shot someone was not made in response to improper interrogation. Sergeant Vach started the conversation as they went downstairs for booking; but the record contains no hint (much less overwhelming proof) that Vach's questions to Menendez, about his family and how he was feeling, were aimed at eliciting a response about the events for which Menéndez had been arrested, or that such a response should reasonably have been anticipated from that conversation. (See *People v. Clark*, *supra*, 5 Cal.4th at p. 985 [police "may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response"; see also *People v. Bradford*, *supra*, 14 Cal.4th at p. 1034 [detective who told defendant during booking that he "looked 'like a traffic ticket'" and asked, "'Is it just a warrant?'" was not engaged in impermissible custodial interrogation]; *People v. Neal* (2003) 31 Cal.4th 63, 85 [statement is not involuntary it if results from feelings of guilt rather than police misconduct].) Vach's questions did not raise the subject of the crime for which Menéndez had been arrested, they did not suggest that Menéndez should confess or that a confession would result in favorable treatment, and Vach had asserted no "compelling influences, psychological ploys, or direct questioning" that were intended to, or were likely to, obtain an incriminating response. (*People v.Clark*, *supra*, 5 Cal.4th at pp. 985-986.)

It is true that a defendant's youth is an appropriate factor that a court should consider when evaluating the voluntariness of an accused's statement or waiver of *Miranda* rights in a custodial circumstance. (*People v. Boyette* (2002) 29 Cal.4th 381, 412; *J.D.B. v. North Carolina* (2011) ___ U.S. ___ [131 S.Ct. 2394, 2406, 180 L.Ed.2d

310] [child's age properly informs *Miranda*'s custody analysis]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 669 [124 S.Ct. 2140, 158 L.Ed.2d 938] (conc. opn. of O'Conner, J.) [suspect's age may be relevant to *Miranda* "custody" analysis].)[18] The record contains no indication that the trial court failed to appropriately consider Menéndez's age in assessing the evidence.

The fact that Menéndez's age is relevant to the inquiry does not mean it is decisive. We find no authority at all that Menéndez's age alone is enough to preclude the trial court from finding that his incriminating statements were voluntarily made, or that he acted knowingly and intelligently in making those statements after having earlier invoked his *Miranda* rights.

III. The Trial Court Did Not Err In Admitting Gang Expert Testimony

When offered to prove a gang enhancement alleged under section 186.22, the culture and habits of criminal street gangs are appropriate subjects for expert opinion testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)[19] The appellants do not dispute this settled law. But they contend that in this case the prosecution's street-gang evidence went beyond these appropriate subjects. Relying on the 2002 decision in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), the appellants contend in their opening brief that the prosecution's questions to its gang expert were improper, because they "were not based on hypotheticals," because they called for the expert "to opine[ ] that the alleged murder was an act committed by [Garcia] and Menéndez for the benefit of the gang," and because the expert's opinion testimony thus invaded the

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[18] In *People v. Boyette*, the issue before the trial court was whether the defendant's confession was voluntary. (29 Cal.4th at p. 412.) In *J.D.B. v. North Carolina*, the issue was whether the accused juvenile would consider himself to have been in custody. (131 S.Ct. at p. 2406.)

[19] "'Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.*, subd. (a).) The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.'" (*People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*).)

province of the jury. Their opening brief argues that the *Killebrew* decision ruled that "an expert witness may not offer an opinion on what a particular defendant is thinking," and that "the prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendant's identity."

In October 2011, however—after the appellants had filed their opening brief—the Supreme Court clarified, sharply narrowed, and to some extent disapproved the *Killebrew* decision in *People v. Vang*, *supra*, 52 Cal.4th 1038. Without changing the rule that a specific defendant's subjective knowledge and intent is not an appropriate subject for expert opinion testimony, the Court nevertheless held that "[h]ypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (*Id*. at p. 1051.)

The appellants' argue in their reply brief the *Vang* decision does not apply here, because "[i]t was perfectly clear to the jury that the 'hypotheticals' were about Garcia and Menéndez," and "[i]f an expert cannot testify that a particular defendant is guilty, then he cannot testify that a 'hypothetical' defendant is guilty." The expert's testimony thus amounted to opinion testimony "that crimes were committed by appellants, and that they were committed for the benefit of the Street Villains gang."

We reject the appellants' argument, both on the basis of the law, and because it is not supported by the record.

The record does not support the appellants' contentions that the questions addressed to the prosecution's gang expert were "were not phrased as hypotheticals and did not ask for answers based on hypothetical questions" ; that they "clearly requested [the expert's] opinions on [Garcia's] and Menéndez's guilt and the premeditated motive underlying the shooting" ; that the expert "opined that crimes were committed by appellants, and that they were committed for the benefit of the Street Villains gang" ; and that "the expert was asked to and did testify directly to the appellants' motives and mental states at the time of the acts."

The prosecution's street gang expert testified to his extensive knowledge and experience concerning the habits of street gangs, and particularly about the territory, habits, and activities of the Street Villains gang.[20] He testified to certain common criminal practices of Street Villains gang members, ranging from writing graffiti to assaults "even up to drive-by shootings and murder." And he testified to the manner in which gangs typically conduct drive-by shootings: They are typically committed by younger members, in order to prove themselves; they are generally preplanned, involving a stolen car and an unregistered gun; their target is generally a rival gang; they are usually done with three people in the car, with the shooter in the back seat; and it is common for someone in the car to call out specific gang identifications.[21] The expert also testified to certain facts based on his personal knowledge and his familiarity with Garcia and Menéndez as individuals. He testified that Garcia and Menendez had told him of their Street Villains gang membership, as had their family members; from that, as well as from their presence in the Street Villains territory and their Street Villains tattoos, the expert

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[20] Early in the expert's direct testimony the trial court interrupted to give the jury a preliminary instruction, that "this witness is testifying in a very limited area in this trial," based on the allegation "that the crime was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to further gang activity by gang members." It went on to instruct (among other things) that "you may consider the gang aspect of this case as a possible motivation for the commission of the crime. Motive is not an element of the crime charged and need not be shown. Presence of motive may tend to show a defendant or defendants are guilty. Absence of motive may tend to show a defendant or defendants are not guilty. . . ." The expert's testimony then resumed without objection from the appellants.

[21] In response to some of the prosecution's general questions about typical gang practices, the court cautioned the jury "to be very careful here," because the questions about whether younger or older gang members typically commit drive-by shootings, though minimally relevant, are "very general." The court noted that people of all ages commit shootings, warning the jury not to conclude that "because this gentleman here, this expert witness, says younger members of gangs sometime commit shootings, that that means that these two gentlemen did, absent other evidence. So I want the jury to understand that."

testified to his opinion that Garcia and Menendez were Street Villains gang members. But the appellants include none of this testimony as coming within their claim of error.

The portions of the testimony that the appellants cite as error show that questions to the prosecution's street-gang expert were phrased as hypotheticals, and sought answers based on those hypothetical questions. The questions sought opinions about the motives that influence gangs and gang members to engage in criminal activities such as the offenses with which the appellants were charged. They did not call for an opinion with respect to Garcia's and Menéndez's guilt or premeditative motives for the shooting, and the expert did not opine that the crimes charged in this case were committed by them. Rather, he testified that the facts, stated as hypotheticals, indicate that the shooting was in the Street Villains' territory, and that it was committed "in association with" the Street Villains gang, for the benefit of both the gang and the participating individuals.

These discrepancies between the appellants' contentions and the record arise from the appellants' position that "the 'hypothetical' questions and answers were improper," even if the gang expert was talking about hypothetical defendants rather than the appellants in this case. But that is exactly the doctrine that the Supreme Court disapproved in *Vang*. There, it held that "'an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth,"'" no matter how "'thinly disguised'" might be the relationship of the hypotheticals to the evidence in the case. (52 Cal.4th at p. 1045, approving *People v. Ward* (2005) 36 Cal.4th 186, 209 [upholding "fact-specific hypothetical questions to elicit expert testimony . . . that a gang member going into rival gang territory—like defendant—would do so as a challenge and would protect himself with a weapon"]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1505, 1513–1514 [prosecutor properly stated hypothetical facts, then asked expert for opinion whether offense "was committed for the benefit of, or in association with the criminal street gang"].) As long as the questions are "rooted in the evidence of the case being tried, not some other case," considerable latitude must be allowed in the facts chosen as to the basis for hypothetical questions. (*Vang*, *supra*, 52

Cal.4th at p. 1046.) Far from reflecting error, it is the close relationship between the facts in the hypothetical question and those shown by the evidence—the fact that the hypotheticals are "thinly disguised"—that "'makes the testimony probative, not inadmissible.'" (*Id.* at pp. 1046, 1047.)

The jury was instructed that an expert's opinion "is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. . . . In permitting [a hypothetical] question, the court does not rule, and does not necessarily find that all of the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. . . ."[22]

As in *Vang*, the street gang expert in this case was properly permitted to express an opinion, based on hypothetical questions that tracked the evidence, that the shooting (if the jury found it had in fact occurred as the prosecution's evidence indicated) would have been for a gang purpose. "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*Vang, supra,* 52 Cal.4th at p. 1048.) We therefore find no error in the trial court's evidentiary rulings on this subject.

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[22] The jury was also instructed with respect to the evidence of street gang activities that, except as otherwise instructed, "this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show that the crime charged was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members. . . . You are not permitted to consider such evidence for any other purpose."

IV. The Trial Court Did Not Err In Imposing Consecutive Sentence Enhancements Of Imprisonment For 25 Years To Life.

The court sentenced Menéndez to imprisonment for 50 years to life: 25 years to life for the first degree murder conviction (§ 190.2, subd. (a)(21); and "in addition [to] and consecutive to that term, an additional twenty-five years pursuant to the allegation, [section] 12022.53[, subdivision](d), and that is for the principal causing death to another individual."

The court also sentenced Garcia to 25 years to life for the first degree murder (exercising its discretion under section 190.5, subdivision (b) not to impose a sentence of life without the possibility of parole), and it imposed a consecutive 25-years-to-life enhancement "pursuant to [section] 12022.53[, subdivision] (d)," for a total sentence of 50 years to life.[23] As it had with respect to Menéndez, the court stayed the section 12022.53, subdivisions (b) and (c) enhancements because it had imposed the enhancement of section 12022.53, subdivision (d).[24]

The appellants challenge the imposition of consecutive 25-years-to-life terms based on the enhancement under section 12022.53, subdivision (d), because the jury did not find that either of them had *personally* discharged the firearm causing Saavedra's death. Section 12022.53, subdivision (d), provides, in pertinent part: "Notwithstanding any other provision of law, any person who, in the commission of a [murder], personally and intentionally discharges a firearm and proximately causes . . . death, to any person other than an accomplice, shall be punished by an additional and consecutive term of

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[23] Garcia's sentencing memorandum to the court proposed that he be sentenced to "25 years to life as an aider and abettor in the murder of Danny Saavedr[a], plus 25 years to life pursuant to [P]enal Code section 12022.53(d) and (e)."

[24] When the verdicts were returned the court declared a mistrial on the special circumstance allegation that the murder was carried out to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)), consistent with the jury's failure to reach a finding on that allegation. And during sentencing, the court struck the section 186.22, subdivision (b) gang enhancements as it was required it to do in order to comply with subdivision (e)(2) of section 12022.53.

imprisonment in the state prison for 25 years to life." As to each of the defendants the jury found "true" the allegation that *a principal* in the offense personally and intentionally discharged a firearm, which proximately caused the victim's death. (§ 12022.53, subds. (d).) But it did not find Menéndez had *personally* used or discharged a firearm causing Saavedra's death; and Garcia was not even charged with having done so. (§ 12022.53, subds. (b), (c) (d).) The appellants therefore are not within the terms expressed in the subdivision (d), section 12022.53, enhancement.

Coming within the language of subdivision (d) of section 12022.53 is not the only way to trigger the enhancement provided by that subdivision, however. Subdivision (e) of that section provides an exception to the requirements of subdivision (d): If certain additional facts have been alleged and proved, the sentence enhancement provided in subdivision (d) applies also to "any person who is a principal" in the commission of the offense, and not just to one who "personally and intentionally" discharged a firearm causing the victim's death.

The additional facts that must be established in order to trigger subdivision (e)'s exception to the personal-discharge requirement of subdivision (d) are, first, that the defendant violated subdivision (b) of section 186.22 (i.e., the offense was found to have been committed for the benefit of, at the direction of, or in association with a criminal street gang); and second, that a principal in the offense used or discharged a firearm in committing the crime (as provided in § 12022.53, subds. (b), (c), or (d)). (§ 12022.53, subd. (e)(1)(A & B).) Thus, subdivision (e) of section 12022.53 authorizes the imposition of the enhanced sentence of subdivision (d) on an aider and abettor against whom a criminal street gang allegation has been pled and proved.

The conditions that subdivision (e) of section 12022.53 requires for the application of subdivision (d) of that section are satisfied here. The jury found that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), and it found that a principal used or discharged a firearm in committing the crime (§ 12022.53, subds. (b), (c), and (e)). The enhancement

provided in section 12022.53, subdivision (d), therefore applies to Menéndez and Garcia by virtue of subdivision (e) of that section, even though the requirements of subdivision (d) alone are unsatisfied.

By sentencing Garcia and Menéndez to the consecutive 25-years-to-life enhancements "pursuant to the allegation, Penal Code 12022.53(d)," without also mentioning subdivision (e) of section 12022.53 by name, the court left no doubt in the record that it fully understood that the jury had reached no verdict "as to personal use, personal discharge, and personal causation of death"—the factual prerequisites to the application of section 12022.53, subdivision (d), alone. It nevertheless identified the substance of subdivisions (d) and (e) together as the basis on which it relied to impose the enhancement on Menéndez: it was imposed "for the principal causing death" to another. And in imposing the enhancement on Garcia, the court plainly indicated its intention to ensure that Garcia's sentence would be no greater than that it had imposed on Menéndez.[25] The court's application of subdivision (e) of section 12022.53 is demonstrated also by the fact that it struck the section 186.22 enhancement with respect to both Garcia and Menéndez, as it was required to do in order to comply with subdivision (e)(2) of section 12022.53, but would not have been required to do unless it was applying subdivision (d).[26]

The court thus removed any question that it intended its imposition of the consecutive 25-years-to-life enhancements to rest on the exception provided in subdivision (e) to the more rigorous section 12022.53, subdivision (d), requirements. We

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[25] In response to the prosecutor's argument that the court should not excuse Garcia from a sentence of life without the possibility of parole under section 190.5, subdivision (b), simply because Menéndez was not also subject to that special circumstance, the court indicated its unwillingness to impose on Garcia (who was not even charged as the shooter) a greater sentence than that received by his co-principal Menéndez.

[26] "An enhancement for participation in a criminal street gang pursuant to Chapter 11 [including section 186.22] shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense [i.e., unless the requirements of subdivision (d) are satisfied]." (§ 12022.53, subd. (e)(2).)

find no error in the court's imposition on Garcia and Menéndez of the 25-years-to-life enhancement consecutive to the underlying sentence of 25 years to life. Garcia and Menéndez come within the terms of that exception; the enhancement of subdivision (d) therefore applies by virtue of their status as principals in a murder for the benefit of, at the direction of, or in association with a criminal street gang, in which a principal used or discharged a firearm. (§ 12022.53, subds. (d) & (e)(1).)

V. The Trial Court Did Not Err By Declining To Commit Menéndez To The California Youth Authority.

Welfare and Institutions Code section 707.2, subdivision (a), provides the court with discretion to remand minors who have been tried as adults (as Menéndez was in this case) to the custody of the Department of Youth Authority for evaluation and report concerning the minor's amenability to training and treatment offered by the Department; and it requires that if the court declines to do so, it "shall make a finding on the record that the amenability evaluation is not necessary." It also provides that "a court of criminal jurisdiction shall not sentence any minor who was under the age of 16 years when he or she committed any criminal offense to the state prison unless he or she has first been remanded to the custody of the Department of Youth Authority for evaluation and report pursuant to this section."

The record in this case contains no indication that the trial court remanded Menéndez to the Department of Youth Authority for evaluation and report pursuant to this provision, and no indication that it found the amenability evaluation to be unnecessary. Menéndez contends on that basis that his commitment to state prison must be set aside, and that he must be remanded for a Department of Youth Authority evaluation and report concerning his amenability to training and treatment, or at least that he must be remanded to the trial court with directions to exercise its discretion in that regard.

Subdivision (b) of Welfare and Institutions Code section 707.2 provides otherwise, however. It provides that "[t]his section shall not apply" where the minor is ineligible for

commitment to the Department of Youth Authority under Welfare and Institutions Code section 1732.6. And that section provides that a minor is ineligible for commitment to the Department of Youth Authority "when he or she is convicted in a criminal action for an offense [including murder] and is sentenced to incarceration for life, an indeterminate period to life, or a determinate period of years such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years." (Welf. & Inst. Code, § 1732.6, subd. (a).)

Menéndez was 14 at the time of his offense, and 17 at the time of his sentencing. He was sentenced to imprisonment for 50 years to life. That period, when added to his age, "would exceed 25 years." (Welf. & Inst. Code, § 1732.6, subd. (a).) The Code requirement that the court exercise its discretion with respect to remanding a minor to the Department of Youth Authority for evaluation and report as to his suitability for training and treatment, and that the court report its exercise of discretion on the record, therefore does not apply to Menéndez.

The record reflects no error.

VI. The 50-Years-To-Life Sentence Imposed On Menéndez Did Not Violate The Federal Or State Proscriptions On Cruel And Unusual Punishment.

The Eighth Amendment to the United States Constitution, applicable to the states by virtue of the Fourteenth Amendment, forbids the imposition of "cruel and unusual punishments" (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108]; *Robinson v. California* (1962) 370 U.S. 660, 667 [82 S.Ct. 1417, 8 L.Ed.2d 758].) Article I, section 17 of the California Constitution contains a similar restriction. Under it, a punishment may be prohibited "not only if it is inflicted by a cruel and unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (*People v. Dillon* (1983) 34 Cal.3d 441, 478.)

Appellant Menéndez contends that the court's imposition of a sentence of 50 years to life must be vacated for its violation of these constitutional proscriptions in light of his youth at the time of the offense, and that this court should exercise its power to modify

his two consecutive sentences of 25 years to life to *concurrent* sentences of 25 years to life. In *Graham*, the United States Supreme Court held that the Constitution prohibits the imposition of a sentence of life without the possibility of parole on a juvenile offender who did not commit homicide. (130 S.Ct. at p. 2034.) In *Roper*, it held that a juvenile offender cannot constitutionally be sentenced to death. (541 U.S. at pp. 574-575.) In *Em*, California's intermediate appellate court held, however, that a sentence of 50 years to life is not disproportionate to the crime of murder with a gang enhancement for a principal's discharge of a firearm resulting in death. (171 Cal.App.4th at p. 977.)

These decisions provide Menéndez with no support. This case is unlike *Graham*, for here Menéndez was convicted of a homicide; nor did his sentence preclude the possibility of parole. It is unlike *Roper*, for Menéndez was not sentenced to death. And although the dissent in *Em* parallels Menéndez's arguments, the majority decision squarely supports the sentence imposed on Menéndez. It upholds a sentence of 50 years to life for the crime of murder with a gang enhancement, imposed on one who was 15 at the time of his offense, based on the use of a firearm by a participating principal. (*Em, supra*, 171 Cal.App.4th at p. 977; see also *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 16 [two consecutive 25-years-to-life terms for murders with special circumstances upheld under state and federal constitutions].) Only by disregarding the limitations expressed in these decisions could we reach the result Menéndez seeks here. (See *People v. Blackwell* (2011) 202 Cal.App.4th 144, 158 [declining to extend holding of *Graham* to homicide offenses]; *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1147 [affirming sentence of life without possibility of parole for murder with special circumstances].)

Menéndez argues that the holdings of *Graham* and *Roper* "indicate that our jurisprudence is evolving" with respect to the sentencing of juvenile offenders, and that our analysis should be informed by the language of those and other recent cases. He attempts to equate his situation to that in *People v. Mendez* (2010) 188 Cal.App.4th 47, 62-68 (*Mendez*), in which Division Two of this court found that a sentence of 84 years to life constitutes cruel and unusual punishment when imposed on one who was a juvenile

of 16 years old when he committed his nonhomicide offense. The court in *Mendez* noted that after considering his presentence credits the appellant would not become eligible for parole until more than a decade after the termination of his life expectancy, and found on that basis that the sentence constituted a *de facto* sentence of life without possibility of parole in violation of the ban on cruel and unusual punishment.

We agree, of course, that "[t]he age of the offender and the nature of the crime each bear on the analysis." (*Graham*, *supra*, 130 S.Ct. at p. 2027.) "As compared to adults, juveniles have a '"lack of maturity and an underdeveloped sense of responsibility"; they 'are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" (*Id.* at p. 2026; *Roper*, *supra*, 543 U.S. at pp. 569–570; see also *In re Barker* (2007) 151 Cal.App.4th 346, 376–377 [youth of the offender is mitigating factor because """the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside"""].)

But Menéndez cannot equate his own circumstance to that in *Mendez*. This case involves a homicide offense, while *Mendez* did not. And the current life-expectancy statistics cited by Menéndez indicate that his eligibility for parole might come more than a decade *before*, not after, his own life expectancy.

Nor do Menéndez's circumstances bring his case within the two more recent decisions he has cited in supplemental briefing. In *Miller v. Alabama* (2012) ___ U.S. ___ , ___ [132 S.Ct. 2455, 2469, 183 L.Ed.2d 407], the United States Supreme Court held that a sentencing scheme cannot constitutionally mandate a sentence of life in prison without possibility of parole for all juveniles found guilty of a homicide offense (though a court might be granted discretion to impose such a punishment). And in *People v. Caballero* (2012) 55 Cal.4th 262, our Supreme Court held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id*. at . 268.) But California's

sentencing scheme does not mandate a sentence of life in prison without the possibility of parole for juveniles who are guilty of a homicide offense. And here, Menéndez's sentence does not fall outside his natural life expectancy.

It is almost certainly true that offenders in long-term confinement will be unlikely to live as long as their unincarcerated peers; and it is true that even if they were to do so, their chances of then being released on parole would remain slim. But the Constitution imposes no categorical prohibition against the imposition of a life term with the possibility of parole on a juvenile who was a participant in a special circumstance murder. (*People v. Demirdjian*, *supra*, 144 Cal.App.4th at p. 16.)

We conclude that Menéndez has not demonstrated that his sentence is disproportionate to his crime, or that "it shocks the conscience or offends the fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) His sentence of two consecutive terms of 25 years to life, while unquestionably severe, does not constitute cruel or unusual punishment prohibited by the federal or state Constitutions. We adopt and repeat the well-chosen words of our colleagues in the First District with respect to this issue: "The Legislature has chosen to severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms. The penalty imposed on [the appellant] was not out of proportion to this offense and does not constitute cruel or unusual punishment." (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 19.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J. JOHNSON, J.